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No. 82-15

In the Supreme Court of the United States

OCTOBER TERM, 1982

RAY E. OLIVER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that the court of appeals erred in holding that the warrantless search of his fenced and posted field was permissible under the "open fields" doctrine.

Petitioner was indicted in September 1980 in the United States District Court for the Western District of Kentucky and charged with manufacturing marijuana, in violation of 21 U.S.C. 841(a)(1). Prior to trial, he moved to suppress evidence obtained from a warrantless search of his property, and the district court granted the motion (Pet. App. 21-24). A panel of the court of appeals affirmed (*id.* at 25-30). The court granted the government's petition for rehearing en banc and, by a 5-4 vote, reversed the suppression order (*id.* at 31-66).

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[1]This supplemental memorandum is submitted in response to the Court's request of September 17, 1982.

1. The facts are detailed at pages 2-3 of our previous submission in this case. Briefly, it was established at the suppression hearing that Kentucky state police officers drove to petitioner's farm to investigate reports that he was growing marijuana there. Once at the farm, the officers drove down a road past petitioner's house until they encountered a locked gate across the road. The property was posted with "No Trespassing" signs. There was no fence at one end of the gate, however, and there was a path around the gate at that point. The officers followed the path, continued down the road, and eventually discovered a large field of marijuana.

The evidence further established that petitioner regularly leased his farmland to others (A. 43-44).[2] He told the police officers and testified at the hearing that he had leased the land where the marijuana was found to two other individuals for the purpose of growing corn (A. 21-22, 45-46, 52-54). Petitioner claimed that, since leasing the property, he had never visited it and that, as far as he was concerned, the property belonged to the lessees during the term of the lease (A. 56-57).

2. The district court suppressed the evidence of the discovery of marijuana, finding that the officers' warrantless entry onto petitioner's property violated a reasonable expectation of privacy. A panel of the court of appeals affirmed, finding that the "open fields" doctrine of *Hester* v. *United States*, 265 U.S. 57 (1924), had been undercut by this Court's decision in *Katz* v. *United States*, 389 U.S. 347 (1967), and that the locked gate and "No Trespassing" signs gave petitioner a reasonable expectation of privacy in his fields. On rehearing en banc, a majority of the full court disagreed with the panel, concluding that the open fields

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[2] "A." refers to the appendix in the court of appeals.

doctrine remained good law and that any expectation of privacy that a property owner might have in his open field was as a matter of law unreasonable.

3. Petitioner contends (Pet. 6-16) that the warrantless search of his open field violated the Fourth Amendment. This contention was correctly rejected by the court of appeals.

a. The question of the scope of the open fields doctrine is currently before this Court on different facts in another case, *Florida* v. *Brady*, cert. granted, No. 81-1636 (May 24, 1982). In *Brady*, police officers entered, without a warrant, a fenced and posted field and had to climb over the fence to gain entry. We argue in our brief as amicus curiae supporting reversal in that case that the fencing of an open field does not necessarily convert the field into an area in which there exists a legitimate expectation of privacy such that a search may be made only pursuant to probable cause and a warrant. Rather, we contend, an open field is an area of reduced privacy expectation that, even if fenced, requires no more than reasonable suspicion to justify a police entry.

b. If the government's position in *Brady* is adopted and the Court reverses the judgment of the Florida Supreme Court, it will be clear, a fortiori, that the decision in the instant case is correct. Even if the Court affirms in *Brady*, however, the result in this case would still be correct because of the factual differences between the two cases. First, although there was a gate across the road that barred vehicles from driving through petitioner's farm, there was no fence at all on one side of the gate, and there was a path around the gate that was clearly used by pedestrian traffic. Thus, as we noted in our brief as amicus curiae in *Brady* (at 23), petitioner took no measures to exclude outsiders from entering his property on foot, and he had no more expectation that an outsider would not enter than did the property owner in *Hester*.

Moreover, petitioner's claim to a legitimate expectation of privacy in the field where the marijuana was found is further undercut by his disclaimer of any personal interest in that part of the farm. Petitioner testified that he had leased the land behind the gate to third parties and that he did not use the leased land or even wander about on it (A. 56). Rather, he regarded the land as belonging to the lessees for the period of the lease. Thus, petitioner was in no position to exclude any guests of the lessees from the property and had no control whatsoever over the persons that entered. He had only a bare legal ownership interest in the property, but no legitimate expectation of privacy, and thus the police entry did not violate his Fourth Amendment rights. *Hester* v. *United States, supra;* see also *Rakas* v. *Illinois,* 439 U.S. 128 (1978); *United States* v. *Rios,* 611 F.2d 1335, 1345 (10th Cir. 1979); *United States* v. *Dyar,* 574 F.2d 1385, 1390 (5th Cir.), cert. denied, 439 U.S. 982 (1978) (mere ownership does not necessarily confer "standing").

c. In sum, even if this Court finds a Fourth Amendment violation in *Florida* v. *Brady,* the court of appeals here correctly held that the law enforcement officers did not violate petitioner's Fourth Amendment rights when they entered his field. Nonetheless, because *Brady* can be expected to shed some light on the scope of the open fields doctrine, it might be appropriate to hold this petition for *Brady* if the present case were not interlocutory. But, as explained in our first submission, there is no reason to hold this petition because petitioner will still have the opportunity on his post-trial appeal — if he is convicted — to reap any benefits that accrue to him from the decision in *Brady.* Thus, holding this petition would serve no useful purpose

and would further delay for many months the commencement of trial on an indictment that was returned more than two years ago.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

OCTOBER 1982

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[3]Contrary to petitioner's contention in his reply memorandum, he is not entitled to pretrial appellate review of his Fourth Amendment claims. If the district court had denied his suppression motion in the first instance, as the court of appeals has held it should have done, it would be clear that he could not appeal from that denial until after trial.

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